Supreme Court, U.S.
FILED
FEB 10 2003
CLERK

No. 02-900

In the Supreme Court of the United States

RONALD G. HARRIS AND SUSETTE M. HARRIS,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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13 pp

QUESTION PRESENTED

Whether an allegedly improper disclosure of tax return information gives rise to liability when it "results from a good faith, but erroneous, interpretation of section 6103" of the Internal Revenue Code. 26 U.S.C. 7431(b).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3-10) and the opinion of the district court (Pet. App. 11-26) are both unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 17, 2002. The petition for rehearing was denied on July 1, 2002. Pet. App. 1-2. The petition for a writ of certiorari was filed on September 30, 2002 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On May 7, 1993, the United States obtained a judgment for unpaid federal income taxes against Ronald G. Harris and Susette M. Harris (petitioners) in the respective amounts of $99,195.15 and $113,552.27. Pet. App. 12. An Internal Revenue Service (IRS) revenue officer named Carabeth Luckey was directed to take appropriate steps to collect that judgment. *Ibid.* On June 24, 1997, petitioners' residence was sold at an IRS auction for $45,000. *Id.* at 13. The proceeds of that sale were applied to petitioners' unpaid tax liabilities.

The property auction was reported in the June 25, 1997, edition of the *Conroe Courier*, a periodical serving Montgomery County, Texas. The article noted that Revenue Officer Luckey had declined comment on the auction except to say that petitioners' tax liability totaled in the "hundreds of thousands of dollars." Pet. App. 13. The article also quoted Henry Holmes, an IRS spokesman, as saying that "the IRS really does not engage in the sale of property unless it's the end of the line and has become evident that the taxpayer cannot or will not be able to pay off their debt." *Ibid.*

2. On June 21, 1999, petitioners filed a complaint in the district court seeking damages under Section 7431 of the Internal Revenue Code for the alleged disclosure of their tax return information to the *Conroe Courier*. Pet. App. 13-14. Petitioners thereafter filed an amended complaint. *Id.* at 9. The government filed an answer to the original complaint but did not file an answer to the amended complaint. Instead, after the amended complaint was filed, the government filed a motion to dismiss and for summary judgment arguing that the comments in the newspaper article did not

constitute unlawful disclosures as a matter of law. The government's motion was based on the undisputed fact that the information contained in the newspaper article was in the public record before that article was published.[1] The government also argued that, even if the alleged disclosure was improper, it did not give rise to any liability because it was based on "a good faith, but erroneous, interpretation" of the disclosure rules set forth in Section 6103 of the Code. See 26 U.S.C. 7431(b)(1). Pet. App. 9, 20-23.

3. The district court held that the United States was not entitled to summary judgment merely because petitioners' tax liability was a matter of public record. Pet. App. 22. Applying the decision of the Fifth Circuit in *Johnson* v. *Sawyer*, 120 F.3d 1307 (1997), the district court held that a disclosure of information that is already in the public record may be actionable if the "immediate source" of the information disclosed is tax return information. Pet. App. 21-22. The district court concluded that it was unclear in this case whether the "immediate source" of the revenue officer's comments about petitioners' tax liability was the public court documents or the officer's own personal knowledge of IRS files. The court therefore held that there is a genuine issue of material fact as to whether the revenue officer's comments violated 26 U.S.C. 6103. Pet. App. 22.

The court nonetheless awarded summary judgment to the United States on alternative grounds. The court

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[1] The government supported its motion for summary judgment with the deposition of Revenue Officer Luckey, who stated that, when she was asked by the reporter about the amount of the liability, she was referring to the amount set forth in the publicly filed judgment against petitioners for unpaid taxes. R. 429.

held that, even if the revenue officer's comments violate Section 6103, they fall within the "good faith" safe harbor of 26 U.S.C. 7431(b). The court explained that the revenue officer's response to the newspaper's inquiry represented a "good faith" interpretation of her obligations under Section 6103 because the law in the Fifth Circuit was not "clearly established" at the time that her statements were made to the newspaper. Pet. App. 23-24.[2]

4. The court of appeals affirmed *per curiam*. Pet. App. 3-10. The court noted that "a violation of § 6103 did not occur" if a public record—such as the federal district court tax judgment—was the "immediate source" of the information concerning petitioners' tax liabilities given to the newspaper. *Id.* at 7-8. The court agreed with the district court, however, that it was unnecessary to resolve any question of fact regarding the "immediate source" of that information because "the disclosure was nevertheless subject to the good faith defense of § 7431(b)." *Id.* at 8.

In so ruling, the court of appeals rejected petitioners' argument that the government had waived the good faith defense by failing to raise it in its answer. The court explained that the good faith defense is a limitation on the government's waiver of sovereign immunity and therefore may be raised at any time. Pet. App. 9.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any

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[2] The court also held that the "general comments on IRS enforcement practices" by IRS spokesman Henry Holmes "did not reveal the [petitioners'] tax return information." Pet. App. 24. Petitioners do not challenge that ruling in the petition.

other court of appeals. Further review is therefore not warranted.

1. Section 6103(a) of the Internal Revenue Code specifies that tax "[r]eturns and return information shall be confidential" and may not be disclosed "except as authorized by [the Code]." 26 U.S.C. 6103(a). Section 6103(b)(2)(A) of the Code defines return information to include information about a taxpayer's identity, the nature, source, or amount of his income, payments, net worth, tax liability, or deficiencies. 26 U.S.C. 6103(b)(2)(A). Subsections (c) through (o) of Section 6103 then provide several specific exceptions to the general rule of nondisclosure.

Section 7431(a) of the Code establishes a cause of action against the United States and provides a damages remedy if a federal officer or employee makes an unauthorized disclosure of a "return or return information." 26 U.S.C. 7431(a). Section 7431(b)(1) provides, however, that no liability shall arise under this section "with respect to any * * * disclosure * * * which results from a good faith, but erroneous, interpretation of section 6103." 26 U.S.C. 7431(b)(1).

Petitioners assert that the IRS improperly disclosed their return information when Revenue Officer Luckey told a newspaper reporter that their liability was in the "hundreds of thousands of dollars." The question whether that statement constituted an unauthorized disclosure of tax return information, however, was not reached and was not decided by either of the courts below. Pet. App. 7-8, 22. Instead, the courts below held that, even if that statement constitutes a disclosure of return information in violation of Section 6103, the United States was not liable for any damages because such statements fall within the good faith exception of Section 7431(b).

A disclosure is based on a good faith but erroneous interpretation of Section 6103—and therefore falls within the good faith exception of Section 7431(b)—if it does not violate clearly established law. *Huckaby* v. *United States Dep't of Treasury*, 794 F.2d 1041, 1048 (5th Cir. 1986). The test for good faith is thus similar to the test applied to claims of qualified immunity in *Bivens* actions, under which the trial judge is to determine whether the defendant's actions were "objective[ly] reasonable[ ]" with reference to "clearly established law" at the time of the conduct in question. *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818-819 (1982).

At the time of the revenue officer's statements in this case, there was no clearly established law about the publication of return information that is also set forth in publicly available records. The Fifth Circuit had not then adopted the rule that Section 6103 prohibits the disclosure of such information unless the "immediate source" of the disclosure was the public record instead of the taxpayer's return. *Johnson* v. *Sawyer*, 120 F.3d at 1323; see Pet. App. 7-8. Moreover, the Internal Revenue Manual has long advised IRS employees that the disclosure of information that exists in the public record is not barred by Section 6103. *Internal Revenue Service Manual: Disclosure of Official Information Handbook*, para. (11)(14)0, at 1272-130 (rev. Jan. 10, 1995). At the time of the statements of the revenue officer in this case, there was thus no clearly established rule that her statements were prohibited under that Section.

2. Petitioners correctly note (Pet. 6) that there is a conflict in the circuits concerning whether Section 6103 precludes the disclosure of return information that is

already in the public record.[3] That conflict, however, is not implicated by the decision in this case. The courts below did not reach the question whether the statements of the revenue officer about petitioners' existing tax liabilities violated Section 6103. Instead, the courts held that, even if the statements did violate that statute, they nonetheless fell within the good faith exception to liability under Section 7431(b) of the Code. Pet. App. 8, 22-23. The decision in this case thus does not present the question on which the circuits have divided.[4]

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[3] Some courts have held that once return information becomes part of the public record, it loses its confidentiality and may be disclosed by the IRS without violating Section 6103. *Lampert* v. *United States*, 854 F.2d 335 (9th Cir. 1988), cert. denied, 490 U.S. 1034 (1989); *William E. Schrambling Accountancy Corp.* v. *United States*, 937 F.2d 1485 (9th Cir. 1991), cert. denied, 502 U.S. 1066 (1992); *Rowley* v. *United States*, 76 F.3d 796 (6th Cir. 1996). Other courts, however, have held that tax return information retains its confidentiality even when it has become part of the public record and that the IRS therefore may not disclose such information from its files. *Mallas* v. *United States*, 993 F.2d 1111 (4th Cir. 1993); *Rodgers* v. *Hyatt*, 697 F.2d 899 (10th Cir. 1983); *Rice* v. *United States*, 166 F.3d 1088 (10th Cir.), cert. denied, 528 U.S. 933 (1999); *Thomas* v. *United States*, 890 F.2d 18 (7th Cir. 1989); *Johnson* v. *Sawyer*, 120 F.3d 1307 (5th Cir. 1997).

[4] Even if the courts below had reached that question and ruled in favor of the government on the ground that the "immediate source" of revenue officer Luckey's statements was the public information contained in the district court's judgment, rather than the IRS's files, that decision would also not have implicated the existing conflict among the circuits concerning whether tax return information loses its confidentiality under Section 6103 once it has become a matter of public record. While some circuits have ruled that such information may retain some degree of protection under Section 6103 (see note 3, *supra*), no court has held that the IRS violates Section 6103 when it publishes information from a public

3. Petitioners err in asserting (Pet. 9) that the government waived its good faith defense under Section 7431(b) when it failed to assert that defense in its answer. The United States filed an answer and amended answer to petitioners' original complaint, but it did not file an answer to petitioners' amended complaint. Instead, the government's motion to dismiss and for summary judgment (in which it raised the good faith defense of Section 7431(b)) was the "initial pleading tendered by defendant" with respect to the amended complaint. See Pet. App. 9. Because an affirmative defense may be raised by motion for summary judgment when the motion is the "initial pleading tendered by defendant" (*Funding Systems Leasing Corp.* v. *Pugh*, 530 F.2d 91, 96 (5th Cir. 1976)), the government properly raised the good faith defense by motion in this case.

In concluding that the government had properly raised the "good faith" defense, the court of appeals stated that this defense is jurisdictional (because it is part of the government's waiver of its sovereign immunity) and therefore may be raised at any time. Pet. App. 9. That additional rationale of the court of appeals creates no conflict and does not, in any event, warrant review by this Court. The government properly raised this defense by motion, and petitioners plainly suffered no prejudice from the presentation of this defense by motion rather than by answer to the amended complaint.

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record that is also contained in the tax return information held by the agency. Indeed, the Seventh and Tenth Circuits have both held that the publication of such publicly available information does not violate Section 6103. *Thomas* v. *United States*, 890 F.2d 18 (7th Cir. 1989); *Rice* v. *United States*, 166 F.3d 1088 (10th Cir.), cert. denied, 528 U.S. 933 (1999).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 2003